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No. 83-1242

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SUN MYUNG MOON and TAKERU KAMIYAMA,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE FOR THE COALITION FOR RELIGIOUS FREEDOM AND CHRISTIAN VOICE, INC. IN SUPPORT OF PETITION FOR CERTIORARI

J. CURTIS HERGE *
ROBERT R. SPARKS, JR.
PHILIP H. BANE
SEDAM & HERGE, P.C.
Suite 1100
8300 Greensboro Drive
McLean, Virginia 22102
(703) 821-1000
**Counsel of Record for*
Amici Curiae
Coalition for Religious Freedom
Christian Voice, Inc.

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BRIEF AMICUS CURIAE FOR THE COALITION FOR RELIGIOUS FREEDOM AND CHRISTIAN VOICE, INC. IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST OF AMICI

Amicus Coalition for Religious Freedom is an association of ministers, rabbis and priests, whose aim is to emphasize the need to protect the nation's churches, and the constitutional right to speak, assemble and worship free from government interference.

The founders and active members of the Coalition for Religious Freedom are Reverend Jerry Falwell, of the Thomas Road Baptist Church; Dr. D. James Kennedy, of the Coral Ridge Presbyterian Church; Dr. Edward V. Hill, of the Missionary Baptist Church; Dr. James T. Draper, of the First Baptist Church, Eulers, Texas; Reverend Jimmy Swaggert, of the Jimmy Swaggert Min-

istries; Dr. William R. Bright, Chancellor of the International Christian Graduate University; Dr. Joshua O. Haberman, of the Washington Hebrew Congregation; Bishop Thomas J. Welsh, of Allentown, Pennsylvania; and, Dr. Charles Stanley, of Atlanta, Georgia. The Coalition and its founders have an active interest in the implications of this case: the intrusion of government into the freedom of religion; and, they support a full venting of the issues raised by Petitioner.

Amicus Christian Voice, Inc. is a nonprofit, tax-exempt corporation, organized and existing under the laws of California. It represents over forty-five (45) denominations of the Christian faith and has 350,000 members, of whom 40,000 are ministers. Christian Voice, Inc. is committed to advancing fundamental Christian morality and the preservation of religious freedom in the promulgation of federal and state legislation. The members of Christian Voice, Inc. have a deep interest in the issues presented by Petitioner and it thus desires to voice the concerns of its members on these issues.

Accordingly, Amici respectfully submit their brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

Amici adopt by reference the Statement of the Case as set forth in the petition for certiorari, insofar as the facts are relevant to the arguments set forth below.

SUMMARY OF ARGUMENT

This case turned on a question of church property ownership: were the assets in question beneficially owned by the International Unification Church Movement [1] or

[1] References to the "Church," "Unification Church," "Movement," "International Movement," and the like, generally, are intended to refer to the International Unification Church Movement, founded

by that Church's leader. This question should have been controlled by the well articulated law of the cases dealing with such questions.

In an unbroken line of decisions, this Court has held that when civil courts are called upon to resolve questions of property ownership involving churches, they must either defer to the definitive determinations of appropriate internal church bodies on the subject, *Watson v. Jones*, 80 U.S. 679 (1871), *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), or resolve the issue by applying "neutral principles" of law in a manner so as to insure its resolution in accord with the desire of the members. *Jones v. Wolf*, 443 U.S. 595, 603-04 (1979).

The decision below, however, contravened constitutional and case teaching and rejected both these approaches. It disregarded the desire and intention of the members and refused to apply the "neutral principles" approach mandated as an alternative.

Instead the court adopted a new and highly debatable theory of ownership and consequent tax liability. Having placed the greatest determinative weight on (i) the uses of the funds, (ii) the fact that Unification Church members sometimes refer to the funds as "Father's" and (iii) that the International Movement was not incorporated, the Court obstructed and frustrated defense efforts to show that these factors actually evidenced and comported with Church, rather than individual, ownership. The court rejected clearly relevant evidence of Unification belief and doctrine which the defense offered to show were church-related and that the nomenclature adopted was also indicative of Church ownership.

The court permitted an unconstitutional inquest by the jury into questions of Church belief, doctrine, teaching,

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and led by Reverend Moon and the religion which it embodied. Where reference to specific Unification Church branches, organizations or affiliated entities is intended, this will be indicated.

mission and ministry, with no guidance or limitation whatever, allowing the jury to find such doctrine true or false, religious or nonreligious as it wished and on whatever basis, or to reject it altogether. On the other hand, the court allowed the prosecution to use this religious context where it became convenient as an aid to conviction. In so doing, it denied due process and transgressed Religion Clauses protection.

ARGUMENT

I. By Refusing to Apply Settled "Neutral Principles" of Law to Resolve a Question of Church Property Ownership, the Second Circuit Rejected the Uniform Holdings of this Court and Violated the First Amendment's Religion Clauses.

As noted, the central question was one of property ownership: were the assets beneficially owned by the Church or by its leader? Usually these questions come before the courts when a dispute arises within a church, as to where ownership lies.

Here, however, there was complete unity within the Church on the issue; the only disputant was a stranger to the congregation; namely, the government. This does not, however, alter the plain fact that the core of the case was a classic dispute over the ownership of church property.

To resolve such disputes, this court has laid down clear and unmistakable ground rules. In a seminal holding, *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), this language is found:

> In this class of cases we think the rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided

> by the highest of these Church judicatories to which the matter has been carried, the legal tribunals *must accept* such decisions as final, and as binding on them, in their application of the case before them. *Id.* at 727. (Emphasis added.)

See also, Presbyterian Church v. Hull Church, 393 U.S. 440, 665 (1969). (Civil courts resolving such controversies inhibit the free development of religious doctrine.)

In other words, if it can be clearly determined, without internal dispute, that competent Church authorities or bodies have decided the question at issue, then that determination must be deferred to and accepted. To do otherwise would be to permit the courts to probe into and adjudicate matters of religious practice and doctrine, something prohibited by the First Amendment. The courts are not even permitted to inquire into the question of which authority within a church has the power to decide, for to permit the courts to judge such matters would violate the First Amendment in the same manner as civil determination of religious doctrine. *Maryland and Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970). *See also, Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 121 (1952) (when property right follows, as incident from decisions of church custom or law on ecclesiastical issues, church rule controls). *Accord, Jones v. Wolf*, 443 U.S. 595, 602 (1979).

In those situations where authoritative internal church determination may not be evident or ascertainable, resort may be had by civil courts to "neutral principles" of law, so long as these are applied in a manner best calculated to "ensure that a dispute over the ownership of church property will be resolved in accord with the desire of the members." *Jones v. Wolf*, 443 U.S. at 603-04.

There was no dispute within the Unification Church, and it was clear, looking to manifest Church desire and teach-

ing, where beneficial ownership lay. The uncontradicted evidence on the point showed that the assets came from fund raising efforts carried out by Church members on behalf of the Church, that they were entrusted to the Church's leader as a charitable gift with the intention that they be used for the benefit of the Church. "Neutral principles" of law, well settled, would require a holding that this established the existence of a trust, or at the very least, a fiduciary holding of these assets by Reverend Moon for the benefit of the Church, a result clearly consonant with the intentions and wishes of the Church and its members. This is pointed out and documented exhaustively by Judge Oakes in his dissenting opinion, 718 F.2d at 1242-43.

For centuries the law has favored charitable and religious trusts and has bent over backward in order to resolve ambiguities in favor of upholding them. *See* 4A A.W. Scott, The Law on Trusts, §§ 371.3 at 2885, 351 at 2797-98 (3rd ed. 1967) [hereinafter cited as *Scott*]; *In re Price's Will*, 264 A.D. 29, 35 N.Y.S.2d 111, 114-15, *aff'd*, 289 N.Y. 751, 46 N.E.2d 354 (1942); *In re Estate of Nurse*, 35 N.Y.2d 381, 389, 362 N.Y.S.2d 441, 446, 321 N.E.2d 537 (1974); N.Y. Est. Powers & Trust Law § 8-1.1 (McKinney 1967).

In numerous cases trusts have been found where there was no formal language and even where the gift was absolute in form, this being frequently inferred merely from the fact that the property came from a church source and was transferred to a church leader. *In re Durbrow's Estate*, 245 N.Y. 469, 477, 157 N.E. 747, 749 (1927); *New York City Mission Society v. Board of Pensions*, 261 A.D. 823, 24 N.Y.S.2d 395, 396 (1941); *Sears v. Parker*, 193 Mass. 551, 79 N.E. 772 (1907); *Jones v. Habersham*, 107 U.S. 174, 182 (1882); *Scott, supra; Fink v. Umscheid*, 40 Kan. 271, 19 P. 623 (1888); *Archbishop v. Shipman*, 79 Cal. 288, 21 P. 830 (1889).

Indeed, many cases have found implied trusts simply from the lone fact that the donee or legatee held a religious office or an office in a charitable institution, despite language or circumstances indicative of absolute gift. *See Scott*, § 371.3 at 2885 and cases there cited; *Id.* at § 351 at 2797-98. *See also In re Fitzgerald's Estate*, 62 Cal. App. 744, 217 P. 773 (1923); *Gibbons Estate*, 40 P.A. D. & C.2d 84, 86-87 (1966); *Williams v. Williams*, 215 N.C. 739, 743 (1939). This view is also reflected in several statutory enactments. *See, e.g.*, N.Y. Relig. Corp. § 91 (Consol.), which provides:

> The archbishop or bishop and the vicar-general of the Diocese to which any incorporated Roman Catholic Church belongs, the rector of such church, and their successors in office, shall, by *virtue of their offices*, be trustees of such church. . . . (Emphasis added).[2]

This line of holdings is entirely consistent with what appears to have been settled Internal Revenue Service (hereinafter "IRS") policy in this same regard, at least until the decision in this case. *See, e.g., Winn v. Commissioner*, 595 F.2d 1060 (5th Cir. 1979); *Morey v. Riddell*, 205 F.Supp. 918 (S.D. Cal. 1962); *Brittingham v. Commissioner*, 57 T.C. 91 (1971). The situation is by no means confined to religious situations but applies equally to those involving political campaigns or other causes. *C.F. O'Dwyer v. Commissioner*, 266 F.2d 575, 585-586 (4th Cir.), *cert. denied*, 361 U.S. 8621 (1959); *7-Up Co. v. Commissioner*, 14 T.C. 965 (1950); *Stratton v. Commissioner*, 54 T.C. 255, 282 (1970). *See, e.g.*, Rev. Rul. 74-23, 1974-1 CB 17; Rev. Proc. 68-19, 1968-1 CB 810, 811.

Indeed, the holding of church property in the personal name of a church leader has long been an accepted method

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[2] *Town of Hardenburgh v. State*, 52 N.Y.2d 536, 421 N.E.2d 795, 796 (1981). "Real property held in trust by a clergyman . . . for the benefit of the members of his incorporated or unincorporated church shall be entitled to the same exemption from taxation . . . ." Quoting from § 436 N.Y. Property Tax Law.

of church property tenure. *See, e.g.*, Kauper and Ellis, "Religious Corporations and the Law," 71 Mich. L.R. 1499, 1506-09 (1973). Under the common law, title to real property of the parish in the Angelican church was taken in the name of the minister, and title to personalty in the name of the church wardens.[3] *Terrett v. Taylor*, 13 U.S. 43, 46-47 (1815). There are many cases holding that where church officials held title to property in their personal names, they did so as trustees for their Churches. *See, e.g., Sears v. Parker*, 193 Mass. 551, 79 N.E. 772 (1907); *Jones v. Habersham*, 107 U.S. 174, 182 (1882), *Fink v. Umscheid*, 40 Kan. 271, 19 P.623 (1888); *Morey v. Riddell*, 205 F.Supp. 918 (S.D. Cal. 1962); *Winn v. Commissioner*, 595 F.2d 1060 (5th Cir. 1979); *Scott* §§ 351, 371.3 at 2797-98, 2885.

Furthermore, this result would obtain regardless of the actual use to which the custodian might put the funds, since use or application inconsistent with trust purposes, under settled, "neutral principles" establishes, at most, a diversion (*not* charged in this case). It does not, by any previous holding, operate to convert the entire trust corpus into the custodian's personal property. 718 F.2d at 1246; (Oakes, J., dissenting); *United States v. Scott*, 660 F.2d 1145, 1151 (7th Cir. 1981), *cert. denied*, 445 U.S. 907 (1982); *Herbert v. Commissioner*, 377 F.2d 65, 70 (9th Cir. 1967).

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[3] The holding of diocesan property in the personal name of Catholic prelates, whether as a corporation sole or otherwise, is equally well known. *See, e.g., Reid v. Barry*, 93 Fla. 849, 112 So. 846 (1927); *Mannix v. Purcell*, 46 Ohio St. 102, 19 N.E. 572 (1888); *St. Peters Roman Catholic Parish v. Urban Redevelopment Authority*, 394 Pa. 194, 146 A.2d 724 (1959), *cert. denied* and *appeal dismissed*, 359 U.S. 435 (1959); *Gospel Tab. Body of Christ Church v. Peace Publ. & Co.*, 211 Kan. 420, 506 P.2d 1135 (1973), *adhered to*, 211 Kan. 927, 508 P.2d 849; *Scott*, § 371.3 at 2884-85; 50 N.Y. Jur. Religious Societies § 111 at 11.

The Second Circuit majority, however, declined to follow the overwhelming weight of the foregoing authorities. Far from deferring to the manifest internal determination of the Church, as evidenced by the members' wishes and intentions, it brusquely swept these aside, holding specifically that these constituted *no* evidence of intent to create a trust,[4] and further stating, remarkably, that there is "no rule" equating a charitable gift with intent to create a trust. 718 F.2d 1224-25.[5]

The courts below thus confirmed the prosecution's theory that all it had to do to establish taxability was to show legal title in the defendant plus a use of some part of the assets in ways which could be characterized as personal. And this, in fact, is all the government really attempted to show.

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[4] The court's specific holding that a donor's intent to create a trust must be "clear and unequivocal," laying emphasis on the importance of using the specific word "trust," is likewise counter to the tide of authority generally, *see, Scott*, § 371.3 at 2885; *Winn v. Commissioner, supra; Morey v. Riddell, supra*; and also to the trust law of New York State, governing in this case. *See, e.g., In re Pattberg's Will*, 282 A.D. 770, 123 N.Y.S.2d 564 (1953), *aff'd*, 306 N.Y. 835, 118 N.E.2d 903 (1954); *Mee v. Gordon*, 187 N.Y. 400, 80 N.E. 353 (1907); *Pierce Estates Inc. v. Commissioner*, 3 T.C. 875 (1944); *Manley v. Fiske*, 139 A.D. 665, 124 N.Y.S. 149, 150-151 (1910); *aff'd*, 201 N.Y. 546, N. 95 N.E. 1133 (1911).

[5] *Cf. Manley v. Fiske*, 139 A.D. 665, 124 N.Y.S. 149, 150-151 (1910), *aff'd*, 201 N.Y. 546, 95 N.E. 1133 (1911). (Trust can be established by will without express words of trust or gift, since "[a] trust is almost inseparably involved with a gift for charitable uses.") *See also, In re Price's Will*, 264 A.D. 29, 35 N.Y.S.2d 111, 114-15, *aff'd*, 289 N.Y. 751, 46 N.E.2d 354 (1942); *In re Durbow's Estate*, 245 N.Y. 469, 477, 157 N.E. 747, 749 (1927). Even if the Second Circuit majority's astonishing assertion were taken as a correct statement of the law, a charitable gift, which this concededly was, was in any event a gift *to the Church* and was thus flatly incompatible with a personal gift to Moon as an individual, which the government nevertheless contended and the court affirmed.

II. By Adopting, *Ad Hoc* and Contrary to Settled Principles, a New and Questionable Theory of Ownership Which Permitted Court and Jury to Weigh and Adjudicate the Content, Validity and Truth of *Bona Fide* Religious Doctrine, The Decision Violated The First Amendment's Religion Clauses and The Fifth Amendment's Due Process Guaranty.

Turning to the factors on which the Second Circuit majority did rely, we assert that the court opened the door to the very invasion of protected belief which the rejected authorities sought to prevent. These factors were: *first*, the fact that Reverend Moon held legal title to the assets and controlled them; *second*, the fact that the Church was unincorporated, while other Church branches and organizations were formally incorporated and had corporate bank accounts; *third*, that in his handling of the assets, Reverend Moon seemingly regarded them as his own, that is to say, "he used funds from the accounts for expenditures which the jury could have concluded were personal in nature"; and *fourth*, that high ranking members of the Church were told that the funds belonged to "Father," an indication which might, without explanation, be taken to mean that the assets were beneficially owned by Moon personally rather than his Church. 718 F.2d at 1220, 1222. These factors, which were adopted *ad hoc* by the court in substitution for the rejected "neutral principles" of law, are examined in greater detail below.[6]

Let us begin by considering the third factor, namely, how the funds were used. The government attempted to

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[6] We omit discussion of element one, legal title, since, as indicated by the authorities cited above, this fact is not very helpful as an indicator of where beneficial ownership lies, particularly in a situation such as this. As the dissenting opinion points out, 718 F.2d at 1242, this issue was really conceded from the beginning, but is an equivocal indication at best, since every trustee must hold legal title and must exercise dominion and control, even though he does *not* hold beneficial ownership, in order to carry out the obligations of his trust.

show: that a portion of the funds was invested in two business enterprises, repeatedly characterized, *a priori*, as "personal" investments; that some were transferred to other church branches; that other funds were lent to the U.S. branch of the Church, an incorporated entity, to assist its acquisition of residence properties and other Church facilities; and, that the assets were referred to, on occasion, within the Church, as "Father's" money. Lastly, the government urged, a small portion of the funds was used for Reverend Moon's living expenses and for the education of his children.[7]

Whether the use of this property was personal as claimed by the government or was, instead, church-related thus became a critical issue.[8] It was not only rele-

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[7] In 1973, these were paid directly from the principal Chase account, and the amounts were reported by Reverend Moon as taxable income to him on his return for 1973. GX 590, 591, 597, 800; T 3729-3730, through 3735, 3812-3813, 4094, 4982-4998; as from May 1974, these personal disbursements were made from a separate "household account." GX 597; T 3581-3582, 3630-3631. These kinds of personal disbursements, particularly with clerical personnel, have long been regarded as consistent with religious trust use and purpose, and well within the range of a trustee's discretion. *See, e.g., Morey v. Riddell, supra, Winn v. Commissioner, supra.* Citations to the record as reprinted in the appendix submitted to the court of appeals will be denoted as follows: citations to pleadings and rulings, "A——"; to pretrial transcripts, "P——"; to trial transcript "T——"; to post-trial transcripts, "S——"; to government exhibits, "GX——"; and to defense exhibits "DX——."

[8] Since the major portion of the funds was used for purposes which were patently church related, i.e., to fund or assist in the acquisition of residence, headquarters and other properties by the U.S. branch, to purchase furnishings and equipment for these and other properties owned by the U.S. branch and affiliated organizations, to provide funds for maintenance and operational expenses for these properties, together with outright transfers of funds to other church branches, the government's claims of even seemingly "personal" uses are properly attributable only to a portion of the total expenditures during the period in question.

vant and material, but vital to the defense to counter the suggestion of personal use by showing that these expenditures benefited various church ministries, advanced the Church's mission and were therefore, church-related. It sought to introduce evidence to establish that in the context of Unification Church doctrine, these expenditures advanced the Church's purpose.

For example, the defense proved it was a central tenet of Unification Church doctrine that the Church establish a strong financial base with which to support and further its mission, and that an important ministry was the investment of Church funds in sound business enterprises and the actual formation and operation of businesses, on a proprietary basis, by other Church entities and members—such as Tong Il Enterprises, the issuer of the stock in question.[9]

It was also undisputed that Reverend Moon, as founder and leader of the International Unification Church Movement, was regarded by his followers as the very embodiment of their faith. This fact, the defense showed, was central to an understanding of why, in Unification belief, a reference to Reverend Moon, who is frequently called by the affectionate term "Father," was the equivalent of a reference to the office he held—and the Movement he led—rather than to the individual himself.[10] Thus, as

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[9] An obvious parallel is the example of the Christian Brothers Winery, owned and operated by a Catholic Order. The reason for this, of course, is that the fruits of this operation furnish valuable financial support to a recognized religious order, and it is clearly "church related" in this sense. It is important to bear in mind that this characterization was not being made for the purpose of claiming a tax exemption or investing an otherwise secular operation with an ecclesiastical gloss, but, rather, to say that its *use*, in this context, served a legitimate religious purpose, i.e., furnishing financial support, and was thus clearly church-related.

[10] To say that the Reverend Moon was the embodiment of the faith was *not* to say, as the court implies, that his person was indis-

the embodiment of the faith, he was at the same time the custodian of the assets marshaled for the furtherance of its mission.

As the majority opinion notes, Reverend Moon was the spiritual leader of his Church, just as the Pope is the spiritual leader of the Roman Catholic Church. 718 F.2d at 1227. Pope John Paul II is frequently referred to by the term "Holy Father," and in that context, a reference to the Holy Father's money or property would certainly be equated with ownership of the property by the Holy See, rather than by "John Paul" as an individual, for the term Holy Father bespeaks the office itself, *not* the individual who holds it at a given moment. The same point was asserted with respect to Reverend Moon by the defense in this case, but completely misconstrued by the Second Circuit.

The government met these explanations with insistent claims that the Church's theology had nothing to do with Reverend Moon's "personal" business ventures and by repeated objections to the introduction of such evidence. These objections were, in major part, sustained by the trial court.

The court also refused requested defense instructions which would have given effect to the members/donors' intent. It refused to instruct that the International Unification Church Movement was personified by Reverend Moon, as its founder and spiritual leader. Nor did the court caution the jury that it could not question or probe into matters of Unification belief or teaching, but must accept these things at face-value, particularly such evidence as there was concerning the religious uses or purposes of the expenditures, the relationship of the Reverend Moon to the Church and the like. Instead, the

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tinguishable from his office. This is clear from the fact that a portion of the funds used by Reverend Moon for personal living expenses and his children's education were reported on his 1973 tax return as being personal to him, as an individual, and on which he paid taxes.

court specifically invited the jury to delve into, examine and decide these matters for themselves, on whatever basis they wished, or to reject them altogether.

The Second Circuit approved this open-ended, blank check authority which was thus handed to the jury, specifically holding that "the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose. . . ." It also approved the charge which enabled the jury to draw its own conclusions regarding the significance of Reverend's Moon's position in the Church, regardless of Church theology. 718 F.2d at 1227-28.

The jury was thus given a free hand to do just what the teaching of the cases tells us the Religion Clauses specifically forbid. It was empowered to look into the beliefs and theology of Reverend Moon's Church, evaluate their validity, their truth and their religious character. It was left perfectly free to judge the character of the expenditures by deciding what the Church's mission was or was not, what its purposes were or weren't. It was turned loose to rewrite church theology and assign whatever significance it chose to Reverend Moon's position in the Church, regardless of what he or his followers felt or thought about it. And, of course, it was also free to treat these percepts as rubbish and reject or ignore them altogether. Thus, under the Religious Clauses, no jury, or court or government agency, for that matter, should have been permitted to do.

Amici assert that while freedom of religious action may be subject to limitation in response to a compelling state interest, the freedom to believe is absolute. "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such," *Sherbert v. Verner*, 374 U.S. 398, 402 (1963), *citing Cantwell v. Connecticut, supra*, 310 U.S. 296, 303 (1939).

Furthermore, the freedom to believe encompasses the freedom to determine, on the basis of one's own criteria, the shape and content of one's religious beliefs. The government enters upon a sensitive and perilous undertaking when it attempts to define the scope of religious belief, even within broad limits. *See, United States v. Seeger*, 380 U.S. 163, 184 (1965); *Welsh v. United States*, 398 U.S. 333, 339-40 (1970).

Thus, the truth or falsity of religious beliefs, sincerely held, may not be examined or questioned. *United States v. Ballard*, 322 U.S. 78 (1944). "If one could be sent to jail because a jury in a hostile environment found . . . [one's religious] teachings false, little indeed would be left of religious freedom." 322 U.S. at 87 (Douglas, J.). As held in that case, a jury may *not* determine the truth or falsity of the religious belief or doctrine of any sect. "When the triers of fact undertake that task, *they enter a forbidden domain.*" 322 U.S. at 87 (emphasis added). In matters involving religious belief, the only permitted inquiry is whether the belief is sincerely held—an issue not raised in this case. 322 U.S. at 81.

In similar fashion, a court must accept a religion's own good faith determination of what is religious, in accordance with its teaching, and what is not, at least when the only issue is whether various uses of the funds were religious and that the funds were held for the religion. When purposes and activities of a religious organization are claimed to be other than religious, the civil authorities may engage in but two inquiries: "Does the religious organization assert that the challenged purposes and activities are religious, and is that assertion *bona fide*?" *Holy Spirit Association v. Tax Commission*, 55 N.Y.2d at 521. Courts may not "go behind the declared content of religious beliefs any more than they may examine into their validity." *Heritage Village*

Church v. State, 299 N.C. 399, 263 S.E.2d 726, 735-36 (1980).[11]

The religious character of ancillary activities undertaken by churches of religious organizations in support or furtherance of their mission must likewise be respected. *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943). The fact that such activities may be business enterprises—as in the case of the Christian Brothers Winery, or import companies, as in the instant case—which are not religious in themselves, does not mean that in the context of support and furtherance of a church's mission they may not, in that church's view, serve or fulfill a religious use or purpose. 319 U.S. at 111.[12]

In the instant case, no question was raised by the government regarding the *bona fides* of the Unification faith or of the precepts and teachings evidenced at the trial. The rules of the foregoing cases thus clearly applied. The court was bound to accept them at face-value and to instruct the jury that it was similarly bound. If, under Unification Church teaching, the expenditures were Church-related and in furtherance of the Church's re-

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[11] *See, also, Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). (The question of proper purposes is an ecclesiastical one.) *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971). (The Supreme Court has been especially sensitive to state entanglement in what is religious and what is secular.) *Accord, Korn v. Rabbinical Council*, —— Cal.App.3d ——, 195 Cal. Rptr. 910 (1983), holding that civil courts are *without jurisdiction* to determine ecclesiastical questions and dismissing a case where the determination of such a question was unavoidably central to the case.

[12] The issue in *Murdock v. Pennsylvania, supra*, was one of tax exemption. No real question was raised concerning the church related character of the activity in question, only whether it should be exempt from a license tax. As we emphasize above, *no* such consideration is present here, where the question is one of church property ownership. In this context, the only issue is whether, in the sincerely held belief of the competent church authorities, the uses and expenditures in question advanced and supported the Church's mission, a clearly protected determination.

ligious mission, the relevance of that fact is patent and undeniable, since Reverend Moon, in directing these uses of the funds was acting consistent with the fiduciary role alleged by the defense. All such evidence should have been admitted and accepted by the court.

The fourth factor upon which the Second Circuit majority relied was the fact that the funds were referred to as "Father's." If, under the teaching of Unification theology, a reference to Reverend Moon, or "Father," the founder and leader of the International Church Movement, was tantamount to a reference to the Movement itself, that fact, too, was clearly relevant as tending to show why references which might, in ordinary circumstances be taken as personal were, in this context, in fact, just the opposite. This, too, should have been admitted and accepted, and the jury so instructed in clear and unambiguous terms.[13]

Instead, the Second Circuit, in violation of the principles above expressed, approved a trial court approach and a jury charge which, to the extent that it did not exclude consideration of Reverend Moon's religion altogether, directed the jury to sit in judgment upon it, without any guidance or limitation whatever. In effect, the court authorized the jury, if it wished, to redraw, redefine or otherwise cancel or reshape the Church's doctrine, its missions and ministries, contrary to the determinations of the Church and the membership itself. A more thoroughgoing repudiation of the First Amend-

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[13] On the continuum of constitutional religious protection running from belief, which is absolutely protected, on the one hand, *Cantwell v. Connecticut*, *supra*, to religious action, which by its nature is not absolutely protected, but may be circumscribed in response to a compelling governmental interest, *Sherbert v. Verner*, *supra*, the use of terms and nomenclature within a church, in accordance with sincerely held belief and doctrine, is certainly most proximate to belief and thus merits absolute protection. The decision in this case, however, does not simply impair or damage that protection; it strips it away altogether.

ment's promise of free exercise and violation of its prohibition against establishments of religion can scarcely be imagined.

Looking to the second factor relied upon by the Second Circuit, the government was permitted to develop and argue that the International Church's unincorporated status and lack of formalized structure meant that it did not exist at all, T.5516-17, 6227, 6229, 6488-92. Moreover, the trial court went further and dignified the argument by precise and detailed instructions which gave it prominent emphasis.[14] How could the court deny that this particular choice of structure, form of holding and deployment of resources were matters of decision internal to the Church and inseparably bound up with considerations of its purpose and mission.

Such matters of church organization, internal structure, polity and resource management are no less religious or ecclesiastical in character than other matters of doctrine and belief. *Serbian Orthodox Diocese v. Milovojevich*, 426 U.S. 696, 708-09, 721-23 (1976); *Kedroff v. St. Nicholas Cathedral*, 34 U.S. 94, 120-21 (1954). If such matters may not be questioned, consistent with the Religion Clauses, how much more clear must it be that such protected determinations as choice of structure, governance and the like, may not be made the subject of a penalty, whether visited upon the organization itself or one of its members? *Speiser v. Randall*, 358 U.S. 24 (1965); *Mt. Healthy City Bd. of Education v. Doyle*, 429

[14] As the very first element in the instruction dealing with the factors to be considered in determining whether a trust existed, the following language appears: "in determining whether in 1973, 1974 and 1975, the International Unification Church Movement existed and whether the Movement owned the funds in the Chase accounts and Tong Il, or whether Reverend Moon owned them, you should consider all the evidence, including such factors whether the Movement had a specific organizational structure, written charter or constitution, the existence of other Unification Church corporate entities during the relevant time period. . . ." 718 F.2d at 1244, n.3.

U.S. 274 (1977). *See also, Larson v. Valente*, 456 U.S. 228 (1982).

Despite the clear teaching of the above cases, however, the jury was empowered to declare that the International Unification Church was legally non-existent. The First Amendment clearly and explicitly forecloses such matters from any such inquiry or consideration.

CONCLUSION

In his eloquent "Memorial and Remonstrance Against Religious Assessments," *Everson v. Board of Education*, 330 U.S. 1 (1947), James Madison observed that, "it is proper to take alarm at the first experiment on our liberties . . . [rather than waiting until] . . . usurped power had strengthened itself by exercise, and entangled the question in precedents." One of the major evils in the bill, which was the subject of this document, was the fact that "the bill implies . . . that the Civil Magistrate is a competent Judge of Religious truth . . . an arrogant pretention falsified by the contradictory opinions of Rulers in all ages. . . ." *Id.* at 65, 67. Madison's prescient observations make it clear that neither the methods of religious tyranny nor their consequences change over the centuries.

The Second Circuit has sanctioned the government's use of religious faith and teaching as a weapon against a church official, while excluding and denying it as a shield in his defense.

By piercing and sundering constitutional barriers erected to protect religious belief and matters of internal, ecclesiastical jurisdiction, the court opens the way for outright persecution. This latter odor hangs about the case, admittedly containing "troubling issues of religious persecution and abridgement of free speech," 718 F.2d at 1216, for the court approved the criminal prosecution of a church leader, even while acknowledging that he was singled out for investigation because of his highly visible

position as the founder and prophet of a new and widely disliked religion.

Unless this court accepts and reviews the Second Circuit's decision, *amici* believe that they may yet live to realize the gloomy consequence foreseen by Justice Douglas in the seminal decision of *United States v. Ballard, supra*, for here, indeed, a jury, in a hostile environment, was empowered to sit in judgment upon the defendant's religious beliefs and decide whether they were true or false. If the decision is allowed to stand, "little indeed [will] be left of religious freedom."

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

J. CURTIS HERGE *
ROBERT R. SPARKS, JR.
PHILIP H. BANE
SEDAM & HERGE, P.C.
Suite 1100
8300 Greensboro Drive
McLean, Virginia 22102
(703) 821-1000

**Counsel of Record for*
Amici Curiae
Coalition for Religious Freedom
Christian Voice, Inc.